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The Appropriate Standard: Disparate Impact under Section 504 of the Rehabilitation Act of 1973

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Notes

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INTRODUCTION

As a wave of disabled soldiers returned from European battlegrounds after World War I, Congress first enacted legislation aimed at rehabilitating the handicapped.[1] Although Congress continued to make important strides toward providing improved education, counseling, training, and other assistance to individuals with physical or mental disabilities,[2] it was slow to enact legislation protecting the civil rights of disabled persons.

Congress finally took action to protect the handicapped from discriminatory treatment with the passage of the Rehabilitation Act of 1973.[3] The heart of the Act, section 504, forbids federally assisted programs from excluding, denying benefits to, or discriminating against "otherwise qualified" handicapped individuals.[4] Section 504 was first proposed as an amendment

1. Bills designed to rehabilitate disabled soldiers were introduced in 1917 and 1918. Congress subsequently extended the program to the industrially disabled with the passage of the Smith-Fess Act, ch. 219, 41 Stat. 735 (1920) (repealed 1973). This Act offered the physically handicapped limited training, counseling, and placement services. *See* S. REP. No. 318, 93d Cong., 1st Sess. 7, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2076, 2082. With the passage in 1935 of the Social Security Act, ch. 531, 49 Stat. 620 (1935) (codified as amended in scattered sections of 42 U.S.C.), which authorized annual appropriations, *id.* § 1001, 49 Stat. at 620 (codified as amended at 42 U.S.C. §§ 1381-1382 (1976 & Supp. V 1981)), the program undertaken in the Smith-Fess Act became more permanent.

2. Congress amended the Smith-Fess Act in 1943, significantly changing the concept of rehabilitation and extending the program to include the mentally ill and mentally retarded. *See* Vocational Rehabilitation Act Amendments of 1943, ch. 190, 57 Stat. 374 (repealed 1973). Subsequent amendments increased the amount of aid available, the scope of the available assistance, and the target population eligible for such aid. *See* Vocational Rehabilitation Amendments of 1968, Pub. L. No. 90-391, 82 Stat. 297 (repealed 1973); Vocational Rehabilitation Act Amendments of 1965, Pub. L. No. 89-333, 79 Stat. 1282 (repealed 1973); Vocational Rehabilitation Amendments of 1954, ch. 655, 68 Stat. 652 (repealed 1973).

3. Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701-794 (1982)).

4. *Id.* § 504, 87 Stat. at 394 (codified as amended at 29 U.S.C. § 794 (1982)).

to title VI of the Civil Rights Act of 1964,[5] which proscribes discrimination based on race, color, or national origin by any program receiving federal financial assistance.[6] As a result, section 504 closely resembles title VI.[7]

Despite the similarity between the two statutes, courts have reached opposite conclusions regarding the applicability of the disparate impact theory,[8] which is permitted under title VI, to actions brought under section 504.[9] In *Joyner v. Dumpson*,[10] the Second Circuit followed the Tenth Circuit in rejecting the disparate impact theory in section 504 litigation; in

5. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000d to 2000d-6 (1976 & Supp. V 1981)). The Rehabilitation Act was first proposed as an amendment to title VI by Representative Charles Vanik of Ohio, 117 CONG. REC. 45,945 (1971), and Senators Hubert Humphrey of Minnesota and Charles Percy of Illinois, 118 CONG. REC. 525 (1972).

6. 42 U.S.C. § 2000d (1976).

7. "Section 504 was patterned after, and is almost identical to, the antidiscrimination language of section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1 . . . ." S. REP. NO. 1297, 93d Cong., 2d Sess. 39, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6373, 6390. Section 504 provides:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

29 U.S.C. § 794 (1982).

8. Under a disparate impact theory of recovery, a plaintiff need only establish that the alleged discrimination had a discriminatory effect; the plaintiff is not required to prove discriminatory intent. In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the seminal disparate impact case, the Supreme Court stated that "[p]ractices, procedures, or tests neutral on their face cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 430. The Court further noted that title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.* at 431.

9. Courts have allowed a disparate impact theory of recovery under § 504 in the following cases: Jennings v. Alexander, 715 F.2d 1036 (6th Cir. 1983); NAACP v. Medical Center, Inc., 657 F.2d 1322 (3d Cir. 1981); Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977); New Mexico Ass'n for Retarded Citizens v. New Mexico, 495 F. Supp. 391 (D.N.M. 1980), *rev'd and remanded on other grounds,* 678 F.2d 847 (10th Cir. 1982). Courts have rejected the theory in the following cases: Joyner v. Dumpson, 712 F.2d 770 (2d Cir. 1983); Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372 (10th Cir. 1981).

10. 712 F.2d 770 (2d Cir. 1983).

Jennings v. Alexander,[11] the Sixth Circuit joined the Third Circuit in allowing the theory. The United States Supreme Court's recent decision in *Guardians Association v. Civil Service Commission*,[12] in which the Court upheld the availability of the disparate impact theory in a title VI context, provides an important precedent with which to resolve this conflict among the circuit courts. This Note contends that, given the close relationship between section 504 and title VI, *Guardians* strongly supports the conclusion that a disparate impact theory should be allowed under section 504.

Part I of this Note discusses the substantive content of the Rehabilitation Act. Part II presents the approaches of the circuit courts to the question whether section 504 permits a disparate impact theory of recovery. Part III discusses the Supreme Court's holding in *Guardians*. Finally, Part IV applies the *Guardians* decision to the conflict noted above and concludes that a disparate impact theory of recovery is now available under section 504.

I. SECTION 504 OF THE REHABILITATION ACT: SUBSTANTIVE CONTENT

The substantive content and legislative history of the Rehabilitation Act reveal that section 504 is the functional equivalent of title VI in the handicap discrimination context.[13] Although the legislative history of the Act is sparse,[14] the Act indicates that it was intended to "promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment."[15] The Act emphasizes the rehabilitation of individuals with severe handicaps and attempts to provide target populations with a greater opportunity to participate fully in society.[16] Congress anticipated that seven million Americans

11. 715 F.2d 1036 (6th Cir. 1983).
12. 103 S. Ct. 3221 (1983).
13. *See infra* notes 33-38 and accompanying text.
14. *See* Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1285 (7th Cir. 1977).
15. 29 U.S.C. § 701(8) (1982).
16. The key to the intent of the bill is the Committee's belief that the basic vocational rehabilitation program must not only continue to serve more individuals, but must place more emphasis on rehabilitating individuals with more severe handicaps. It is the bill's intent to be more responsive to the needs of the handicapped individual by providing a better basic program of service as well as an emphasis within special project authority for target populations whose needs are not now being met within the basic program. Additionally, the committee has added provisions designed to focus research and training activities on making

would benefit from the rehabilitation services provided under the Act.[17]

Section 504, the key antidiscrimination provision of the Act, provides:

> No otherwise qualified handicapped individual in the United States, as defined by section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .[18]

The Act also contains important provisions aimed solely at discrimination against the handicapped in employment. Section 501 proscribes such discrimination by the federal government,[19] and section 503 extends the prohibition to businesses that enter into certain types of contracts with the federal government or that subcontract with federal contractors.[20] Section 504, unlike sections 501 and 503, is not limited to the employment context.

To bring suit under section 504, an individual must come within the statutory definitions of "handicapped" and "otherwise qualified."[21] The Act defines a handicapped individual as

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employment and participation in society more feasible for handicapped individuals.

S. REP. NO. 318, 93d Cong., 1st Sess. 2, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2076, 2092.

17. *Id.*, 1973 U.S. CODE CONG. & AD. NEWS at 2091.

18. 29 U.S.C. § 794 (1982).

19. *Id.* § 791.

20. *Id.* § 793.

21. *Id.* § 794. Every federal court that has considered the issue has held that a private cause of action is available under § 504. *E.g.,* Camenisch v. University of Tex., 616 F.2d 127, 131 (5th Cir. 1980), *vacated and remanded on other grounds,* 451 U.S. 390 (1981); *see also infra* note 34. The Supreme Court has implicitly recognized a private cause of action under § 504. *See* Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248 (1984).

In *Consolidated Rail Corp.*, the issue before the Court was whether § 504 incorporated the limitation contained in § 604 of title VI under which employment discrimination is actionable only when the "primary objective" of the federal financial assistance received by the employer is to provide employment. *See* 42 U.S.C. § 2000d-3 (1976). The courts of appeals were split on this issue. Some had held that this limitation was incorporated in § 504 by the 1978 amendments to the Rehabilitation Act. *See* Scanlon v. Atascadero State Hosp., 677 F.2d 1271, 1272 (9th Cir. 1982); United States v. Cabrini Medical Center, 639 F.2d 908, 910 (2d Cir. 1981); Carmi v. Metropolitan St. Louis Sewer Dist., 620 F.2d 672, 675 (8th Cir.), *cert. denied,* 449 U.S. 892 (1980); Trageser v. Libbie Rehabilitation Center, 590 F.2d 87, 89 (4th Cir. 1978), *cert. denied,* 442 U.S. 947 (1979). Other courts had held that the complainant must establish that the program benefited directly from the receipt of federal assistance, *see* Brown v. Sibley, 650 F.2d 760, 769 (5th Cir. 1981); Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1232 (7th Cir. 1980), but need not demonstrate that the primary purpose of the assistance was to provide employment, *see* Jones v. Metropolitan Atlanta Rapid Transit Auth., 681 F.2d 1376, 1382 (5th Cir. 1981). In *Consolidated Rail Corp.*, the Court re-

"any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment."[22] In *Southeastern Community College v. Davis*,[23] the Supreme Court defined an "otherwise qualified" person as "one who is able to meet all of a program's requirements in spite of his handicap."[24] The Eighth Circuit Court of Appeals has noted that in interpreting the "otherwise qualified" requirement "the proper focus . . . is . . . whether the requirements set forth by defendants . . . are necessary and legitimate requirements of the job."[25]

The prohibitions contained in section 504 extend to any "program or activity receiving federal financial assistance."[26] Department of Health and Human Services regulations define "recipient" to include states, public and private organizations, and individuals.[27] In addition, section 504 covers "any program or activity conducted by an Executive agency or by the United States Postal Service."[28]

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solved this conflict, holding that § 504 does not incorporate the "primary objective" limitation. 104 S. Ct. at 1253-55. Although the defendant initially argued that there is no private cause of action under § 504, it later abandoned this argument. Consequently, the Court stated that it was "unnecessary to address the question here beyond noting that the courts below relied on Cannon v. University of Chicago, 441 U.S. 677 (1979), in holding that such a private right exists under § 504." 104 S. Ct. at 1252 n.7.

22. 29 U.S.C. § 706(7)(B) (1982). For precise definitions of the terms in the definition of handicapped, see 29 C.F.R. § 1613.702 (1983); 41 C.F.R. § 60.741 app. A (1981).

23. 442 U.S. 397 (1979). Respondent filed suit when she was denied admission to a nursing program conducted by petitioner on the basis of a serious hearing disability. The Court held that respondent was not an "otherwise qualified handicapped individual" within the meaning of § 504 and therefore the decision to exclude her from the program was not discriminatory. *Id.* at 413.

24. *Id.* at 406; *see also supra* note 29 and accompanying text.

25. Simon v. St. Louis County, Mo., 656 F.2d 316, 320 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982).

26. 29 U.S.C. § 794 (1982).

27. The Department of Health and Human Services defines recipient as

> any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

45 C.F.R. § 84.3(f) (1983).

28. 29 U.S.C. § 794 (1982). Section 504 augments the coverage of § 501b. *See* H.R. REP. No. 1780, 95th Cong., 2d Sess. 92-93, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 7312, 7403-04. Thus, federal employers are potentially liable for employment discrimination against the handicapped under either § 501 or § 504.

Although courts in various jurisdictions have yet to reach a consensus as to

II. DISPARATE IMPACT AND SECTION 504 IN THE COURTS

The federal courts of appeals have split on the question whether section 504 permits a disparate impact theory of recovery. The Second Circuit, in *Joyner v. Dumpson*,[29] and the Tenth Circuit, in *Pushkin v. Regents of the University of Colorado*,[30] have refused to allow plaintiffs to use a disparate impact theory to prove violations of section 504. In contrast, the Sixth Circuit, in *Jennings v. Alexander*,[31] and the Third Circuit, in *NAACP v. Medical Center, Inc.*,[32] have allowed plaintiffs to use a disparate impact theory of recovery. This conflict among

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the proper relief for a violation of § 504, courts have granted injunctive relief. *See* Camenisch v. University of Tex., 616 F.2d 127 (5th Cir. 1980), *vacated and remanded on other grounds,* 451 U.S. 390 (1981); Tatro v. Texas, 625 F.2d 557 (5th Cir. 1980); Baker v. Bell, 630 F.2d 1046 (5th Cir. 1980). Since the Supreme Court's decision in Southeastern Community College v. Davis, 442 U.S. 397 (1979), however, the injunctive relief awarded plaintiffs under § 504 has been considerably circumscribed. In *Davis*, the Court ruled that § 504 does not require recipients of federal financial assistance to take affirmative steps to accommodate handicapped individuals. *Id.* at 407-12. In the wake of *Davis*, courts may limit injunctive relief in cases of employment discrimination to measures such as reinstatement and seniority rights. Courts are split with respect to the availability of monetary damages under § 504. A majority of courts have held that such relief is appropriate. *See, e.g.,* Miener v. Missouri, 673 F.2d 969, 978 (8th Cir.), *cert. denied,* 103 S. Ct. 215 (1982); Gelman v. Department of Educ., 544 F. Supp. 651, 653-54 (D. Colo. 1982); Hutchings v. Erie City & County Library Bd. of Directors, 516 F. Supp. 1265, 1269 (W.D. Pa. 1981); Patton v. Dumpson, 498 F. Supp. 933, 939 (S.D.N.Y. 1980); Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948, 949 (D.N.J. 1980). *But see* Ruth Anne M. v. Alvin Indep. School Dist., 532 F. Supp. 460, 474 (S.D. Tex. 1982); Boxall v. Sequoia Union High School Dist., 464 F. Supp. 1104, 1112 (N.D. Cal. 1979). In addition, a prevailing party other than the United States may seek reasonable attorneys' fees under the Act. 29 U.S.C. § 794a(b) (1982). Finally, § 504 authorizes an agency to terminate funding to programs that violate the Act. *Id.* § 794.

29. 712 F.2d 770 (2d Cir. 1983). Plaintiffs brought a class action suit on behalf of approximately 5000 New York children challenging the constitutionality of certain New York statutes that required parents who desired state-subsidized residential care for their children to transfer temporary custody of the children to the state. Plaintiffs alleged that the custody-transfer requirement, on its face and as applied, violated their fourteenth amendment substantive due process rights, title IV of the Social Security Act, and § 504 of the Rehabilitation Act of 1973. *Id.* at 771-72.

30. 658 F.2d 1372 (10th Cir. 1981).

31. 715 F.2d 1036 (6th Cir. 1983). Plaintiffs alleged that a variety of proposed reductions designed to save Tennessee money on Medicaid expenditures violated § 504. Such reductions included "deletion of certain drugs from the Medicaid formulary, reductions in the level of reimbursement for health care providers, reduction of inpatient hospitalization coverage, and reduction of outpatient hospitalization services." *Id.* at 1038. By the time the case came to trial, only the reduction in hospitalization coverage remained at issue. *Id.* at 1039.

32. 657 F.2d 1322 (3d Cir. 1981). Plaintiffs alleged that the proposed relocation of the Wilmington Medical Center from the inner-city to a suburb had an adverse effect on the handicapped. *Id.* at 1325.

the circuits stems from the courts' divergent conclusions concerning the effect of variances between the language of title VI and that of section 504, and from their contrary decisions with respect to the validity of the interpretive regulations promulgated under section 504.

In concluding that plaintiffs may use a disparate impact theory to establish violations of section 504, both the Third and Sixth Circuits pointed to the close similarity between section 504 and title VI. Congress patterned the language[33] and general design[34] of section 504 directly after title VI. Further, Congress

33. *Compare* 42 U.S.C. § 2000d (1976) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.") *with* 29 U.S.C. § 794 (1982) ("No otherwise qualified handicapped individual in the United States, as defined by section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .").

34. Congress specifically and explicitly patterned § 504 after title VI:

> Section 504 was patterned after, and is almost identical to, the antidiscrimination language of section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1 (relating to race, color, or national origin), and section 901 of the Education Amendments of 1972, 42 U.S.C. 1683 (relating to sex). The section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap. It does not specifically require the issuance of regulations or expressly provide for enforcement procedures, but it is clearly mandatory in form, and such regulations and enforcement are intended.

S. REP. NO. 1297, 93d Cong., 2d Sess. 39-40, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6373, 6390.

Congress also intended § 504 to be enforced in a manner similar to title VI:

> The language of section 504, in followig [sic] the above-cited Acts, further envisions the implementation of a compliance program which is similar to those Acts, including promulgation of regulations providing for investigation and review of recipients of Federal financial assistance, attempts to bring non-complying recipients into voluntary compliance through informal efforts such as negotiation, and the imposition of sanctions against recipients who continue to discriminate against otherwise qualified handicapped persons on the basis of handicap. Such sanctions would include, where appropriate, the termination of Federal financial assistance to the recipient or other means otherwise authorized by law. Implementation of section 504 would also include pre-grant analysis of recipients to ensure that Federal funds are not initially provided to those who discriminate against handicapped individuals. Such analysis would include pre-grant review procedures and a requirement for assurances of compliance with section 504. This approach to implementation of section 504, which closely follows the models of the above-cited antidiscrimination provisions, would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, *and permit a judicial remedy through a private action*.

Id. at 40, 1974 U.S. CODE CONG. & AD. NEWS at 6390-91 (emphasis added).

amended the Rehabilitation Act in 1978 to make "the remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964" available under section 504.[35] In *Jennings*, the Sixth Circuit noted that "[c]ourts have generally applied the same tests of discrimination law to section 504 as are applied to Title VI."[36] The court went on to quote approvingly from *Medical Center, Inc.*, in which the Third Circuit, after noting that disparate impact analysis is permitted under title VI,[37] concluded that "[t]he Rehabilitation Act . . . provide[s an] equally strong [case] for application of an impact test since [it is] patterned after Title VI. We therefore use the same standard."[38]

The Sixth Circuit also relied on regulations promulgated under section 504 by the former Department of Health, Education, and Welfare (HEW), which forbid the use of federal funds in programs that have a discriminatory effect on the handicapped.[39] The court stated that "[r]egulations by the enforcing

35. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1974, Pub. L. No. 95-602, § 102(a), 92 Stat. 2955, 2983 (codified as amended at 29 U.S.C. § 794a (1982)).

36. 715 F.2d at 1041.

37. Prior to the Supreme Court's decision in Guardians Ass'n v. Civil Serv. Comm'n, 103 S. Ct. 3221 (1983), there had been some controversy as to whether the disparate impact standard upheld under title VI in Lau v. Nichols, 414 U.S. 563 (1974), was overruled by the Court in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). In *Guardians*, the Court held that a disparate impact analysis continues to be available under title VI. *See infra* text accompanying notes 59-77.

38. 657 F.2d at 1322; *see also* Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977). In *Lloyd*, without specifically discussing whether a showing of discriminatory effect establishes a violation of § 504, the Seventh Circuit held that § 504 applied to a claim challenging the funding of certain public mass transportation programs which had the effect of discriminating against the physically disabled. The court stated:

> Because of the near identity of language in Section 504 of the Rehabilitation Act of 1973 and Section 601 of the Civil Rights Act of 1964, *Lau* is dispositive. Therefore, we hold that Section 504 of the Rehabilitation Act, at least when considered with the regulations which now implement it, establishes affirmative rights and permits this action to proceed.

Id. at 1281.

39. The regulations were not issued until nearly four years after the passage of the Rehabilitation Act. The delay resulted from difficulties in drafting regulations to prohibit discrimination against the handicapped. *See* 41 Fed. Reg. 29,547 (1976). HEW promulgated the regulations only after an executive order and a court order were issued. President Ford directed HEW "to coordinate the implementation of Section 504 . . . by all Federal departments and agencies . . . so that consistent policies, practices, and procedures are adopted with respect to the enforcement of Section 504." Exec. Order No. 11,914, 3 C.F.R. 117 (1977). The United States District Court for the District of Columbia issued an order in Cherry v. Matthews, 419 F. Supp. 922, 924 (D.D.C. 1976), directing HEW to issue regulations implementing § 504 without further delay.

agency are entitled to great weight."[40] The HEW regulations specifically prohibit recipients of federal funds from utilizing "criteria or methods of administration . . . which have the *effect* of subjecting qualified handicapped persons to discrimination on the basis of handicap."[41] Congress envisioned the promulgation of regulations implementing section 504[42] and, indeed, has since approved the HEW regulations.[43] Relying on these regulations, the Sixth Circuit concluded that a showing of disparate impact suffices to prove a prima facie case of discrimination under section 504.[44]

In contrast, the Second Circuit, in *Joyner*, and the Tenth Circuit, in *Pushkin*, distinguished between discrimination based on impermissible factors such as race, sex, or national origin and discrimination based on handicap. Although it is impermissible to evaluate an individual based on race, sex, or national origin, it is permissible to take account of handicaps in determining whether an individual is "otherwise qualified" for a job or for participation in a federal program.[45] Furthermore, instances may arise where a handicap will render an "otherwise qualified" individual less qualified than a nonhandicapped individual.[46] Thus, "a § 504 action frequently does not lend itself easily to the analysis used for allocation of burdens and order of presentation of proof used in suits alleging

40. 715 F.2d at 1041 (citing Brennan v. Owensboro-Davis Co. Hosp., 523 F.2d 1013, 1028 (6th Cir. 1975), *cert. denied,* 425 U.S. 973 (1976)).

41. 45 C.F.R. § 84.4(b)(4)(i) (1983) (emphasis added). The regulations indicate that the use of an "effects" standard under § 504 "is an application of the principle established under Title VII of the Civil Rights Act of 1964 in *Griggs v. Duke Power Company*." 45 C.F.R. § 84.61 app. A, at 303 (1983); *see supra* note 8.

42. *See supra* note 34. Patterned directly after title VI, "the language of section 504 . . . envisions the implementation of a compliance program which is similar to [title VI], including promulgation of regulations providing for investigation and review of recipients of Federal financial assistance." S. REP. NO. 1297, 93d Cong., 2d Sess. 40, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6373, 6390; *see also supra* text accompanying note 35, and notes 38-39.

43. *See infra* text accompanying note 104.

44. 715 F.2d at 1042.

45. Doe v. New York Univ., 666 F.2d 761, 776 (2d Cir. 1981); *see also supra* text accompanying note 24; *infra* text accompanying note 90.

46. Doe v. New York Univ., 666 F.2d 761, 766 (2d Cir. 1981). In *Doe*, a medical student seeking readmission to medical school filed suit alleging she was discriminated against in violation of § 504. The Second Circuit held that plaintiff was not entitled to a mandatory preliminary injunction because she had failed to establish that in spite of her handicap she was as qualified as other applicants who were admitted. *Id.* at 777. The court, however, denied the medical school's motion for summary judgment because it concluded that there was a substantial factual issue on the merits of plaintiff's claim. The court did not consider whether plaintiff could rely on a disparate impact theory to establish a violation of § 504. *Id.* at 762.

discrimination based on impermissible factors."[47] In light of these considerations, the Second and Tenth Circuits rejected the importation of title VI theories, such as disparate impact,[48] which are forged in the context of discrimination based on impermissible factors, to section 504 actions, in which a handicap may constitute a permissible factor in the determination of whether a candidate is qualified.[49]

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47. *Id.* at 776. The analysis used for allocating burdens and order of presentation of proof in suits alleging discrimination based on impermissible factors was described by the Second Circuit in *Doe* as follows:

> In such suits although the plaintiff has the ultimate burden of proving by a fair preponderance of the evidence that the defendant discriminated against him on the basis of an impermissible factor, he may establish a prima facie case by proving that he applied for a position for which he was qualified and was rejected under circumstances indicating discrimination on the basis of an impermissible factor. The burden then shifts to the defendant to rebut the presumption of discrimination by coming forward with evidence that the plaintiff was rejected for a legitimate reason, whereupon the plaintiff must prove that the reason was not true but a pretext for impermissible discrimination.

Id. at 776. This method of analysis was established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); *see also* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

In *Doe*, the Second Circuit maintained that because the analysis suggested in *McDonnell Douglas* is phrased in terms of permissible versus impermissible factors, it is inapplicable to claims brought under § 504, in which it is permissible to consider an individual's handicap in determining whether that individual is "otherwise qualified." 666 F.2d at 776.

48. Although he concurred with the result in *Joyner*, Judge Mansfield concluded that § 504 does permit a disparate impact analysis. 712 F.2d at 783. Mansfield noted that disparate impact analysis "is now well established as a method of enforcing anti-discrimination statutes." *Id.* (citing Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Griggs v. Duke Power, Co., 401 U.S. 424, 429-30 (1970); Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied,* 451 U.S. 945 (1981)). Mansfield further noted that the Rehabilitation Act's failure to mention a disparate impact standard "has no significance; no such mention is found in Title VII or the Age Discrimination in Employment Act," statutes which permit a disparate impact theory of recovery, 712 F.2d at 784. Finally, Mansfield asserted that "[s]ection 504 is intended to be part of the general corpus of discrimination law," *id.* (citing New York Ass'n for Retarded Children v. Carey, 612 F.2d 644, 649 n.5 (2d Cir. 1979)), and that the Supreme Court implicitly recognized a disparate impact theory under § 504 in Southeastern Community College v. Davis, 442 U.S. 397 (1979).

49. Joyner v. Dumpson, 712 F.2d 770, 775-76 (2d Cir. 1983); Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1384-85 (10th Cir. 1981). In *Joyner*, the Second Circuit asserted that, instead of relying on a discriminatory effects standard, plaintiffs should have adhered to the four-prong Rehabilitation Act analysis articulated in *Doe*. Under that analysis, " 'plaintiff must prove (1) that she is a "handicapped person" under the Act, (2) that she is "otherwise qualified" for the position sought, (3) that she is being excluded from the position solely by reason of her handicap, and (4) that the position exists as part of a program or activity receiving Federal financial assistance.' " *Id.* at 774 (quoting Doe v. New York Univ., 666 F.2d 761, 774-75 (2d Cir. 1981)). The Second Circuit concluded that the district court had erred by overlooking the third element in the *Doe* test. *Id.* at 774.

In *Joyner*, the Second Circuit also refused to give "inordinate weight to regulations promulgated pursuant to the Act."[50] The court noted that although agency regulations deserve considerable deference, "this Court will not interpret an agency regulation to thwart a statutory mandate."[51] Because the Act precludes programs only from discriminating "solely" on the basis of handicap[52] and does not mention an "adverse disparate impact" test, the court concluded that plaintiffs bringing suits under section 504 cannot rely on such a test.[53]

III. *GUARDIANS ASSOCIATION V. CIVIL SERVICE COMMISSION*

In *Regents of the University of California v. Bakke*,[54] the Supreme Court cast some doubt on the continued availability of disparate impact analysis under title VI. In *Lau v. Nichols*,[55] decided prior to *Bakke*, the Court indicated that discriminatory effect alone is sufficient to establish a violation of title VI.[56] Some courts held that *Bakke* overruled *Lau* and that a showing of discriminatory effect alone would no longer establish a violation of title VI.[57] Other courts continued to follow *Lau*.[58] In

50. 712 F.2d at 774. Plaintiffs argued that because the regulations promulgated under § 504 outlaw discriminatory effects, plaintiffs were entitled to rely on a disparate impact standard. *See id.* at 775; *supra* text accompanying note 41.

51. 712 F.2d at 775 (quoting Insurance Co. of N. Am. v. Gee, 702 F.2d 411, 414 (2d Cir. 1983)).

52. Title VI, for example, prohibits exclusion, denial, or discrimination "on the ground of" race, color, or national origin; § 504 prohibits similar acts or omissions "solely by reason of" handicap. *See supra* note 23.

53. 712 F.2d at 775.

54. 438 U.S. 265 (1978).

55. 414 U.S. 563 (1974).

56. *Id.* at 569. In *Lau*, approximately 1800 non-English speaking Chinese brought suit against officials of the San Francisco Unified School District alleging that school officials had an obligation to provide plaintiffs with equal educational opportunities. *Id.* at 564. Relying on legislatively mandated regulations promulgated by HEW, the Court stated:

> Discrimination is barred which has that *effect* even though no purposeful design is present: a recipient "may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination" or have "the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin."

Id. at 568 (quoting 45 C.F.R. § 80.3(b)(2) (1974)). The Court concluded that the San Francisco schools were effectively excluding Chinese speaking children from meaningful access to public education in violation of title VI. *Id.* at 568-69.

57. *Bakke* involved a constitutional and statutory challenge to the affirmative action plan implemented by the University of California at Davis Medical School. Justice Powell, author of the plurality opinion, wrote that "Title VI must be held to proscribe only those racial classifications that would violate the

Guardians Association v. Civil Service Commission,[59] the Supreme Court finally resolved this conflict. In a plurality opinion, the Court concluded that a showing of disparate impact is sufficient to establish a violation of title VI[60] but added that, in the absence of a showing of intent to discriminate, "declaratory and limited injunctive relief should be the only available private remedies."[61] Given the close relationship and similarities between title VI and section 504 of the Rehabilitation Act,[62] the *Guardians* decision has important implications for the resolution of the conflict among the circuits concerning the availability of a disparate impact theory of recovery under section 504.[63]

In *Guardians*, a group of black and Hispanic police officers challenged tests used by the New York City Police Department to make entry-level appointments.[64] Although all of the plaintiffs successfully completed the examination, under the Department's policy of making appointments in order of test score rank, black and Hispanic officers were hired later than white officers. As a result, blacks and Hispanics accumulated less seniority and related benefits than white officers. In addition, the Department's last-hired, first-fired policy, under which officers with lower test scores faced earlier layoffs, disproportionately

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Equal Protection Clause of the Fifth Amendment." 438 U.S. at 287. Because the Supreme Court has held that only intentional discrimination is illegal under the Constitution, *see* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977); Washington v. Davis, 426 U.S. 229, 238-48 (1976), some courts interpreted *Bakke* as overruling *Lau*, *see, e.g.,* Cannon v. University of Chicago, 648 F.2d 1104, 1109 (7th Cir.), *cert. denied,* 454 U.S. 1128 (1981); Castaneda v. Pickard, 648 F.2d 989, 1006 (5th Cir. 1981); Guardians Ass'n v. Civil Serv. Comm'n., 633 F.2d 232, 264 (2d Cir. 1980), *rev'd,* 103 S. Ct. 3221 (1983); Lona v. Board of Educ., 623 F.2d 248, 250 (2d Cir. 1980); Parent Ass'n v. Ambach, 598 F.2d 705, 717 (2d Cir. 1979); Harris v. White, 479 F. Supp. 996, 1002 (D. Mass. 1979).

58. NAACP v. Medical Center, Inc., 657 F.2d 1322, 1329 (3d Cir. 1981) (en banc); Guadalupe Org., Inc. v. Tempe Elementary School Dist. No. 3, 587 F.2d 1022, 1026 n.2 (9th Cir. 1978); Jackson v. Conway, 476 F. Supp. 896, 903 (E.D. Mo. 1979), *aff'd on other grounds,* 620 F.2d 680 (8th Cir. 1980); Johnson v. City of Arcadia, 450 F. Supp. 1363, 1378 (M.D. Fla. 1978).

59. 103 S. Ct. 3221 (1983). *Pushkin*, *Joyner*, and *Medical Center, Inc.* were all decided before *Guardians*. *Jennings* was decided after *Guardians*, although the decision in *Jennings* was released only approximately one month after the *Guardians* decision.

60. *Id.* at 3223. The plurality consisted of Justices White, Marshall, Stevens, Brennan, and Blackmun.

61. *Id.*

62. *See supra* notes 33-34 and accompanying text.

63. *See supra* notes 8-10 and accompanying text.

64. 103 S. Ct. at 3223. Plaintiffs alleged, among other things, violations of their rights under titles VI and VII of the Civil Rights Act of 1964. *Id.*

affected blacks and Hispanics.[65]

In upholding plaintiffs' right to rely on a disparate impact theory under title VI, the Supreme Court disagreed with the Second Circuit's determination that subjective intent to discriminate is essential to a title VI violation.[66] Of those Justices who upheld a disparate impact standard under title VI, only Justice White asserted that the statute on its face outlaws discriminatory effects.[67] Maintaining that the *Lau* effects standard[68] had survived *Bakke*,[69] Justice White argued that the issue in *Bakke* was whether title VI forbids affirmative action, a form of intentional discrimination, even though the Constitution permits it.[70] He contended that the Court's holding in *Bakke* that title VI does not prohibit affirmative action because it is not prohibited by the Constitution did not compel the conclusion that title VI proscribes only intentional discrimination because the Constitution proscribes only intentional discrimination.[71]

Five Justices, including Justice White, held that regardless of whether title VI on its face allows a discriminatory effects standard, the administrative regulations promulgated under the statute provide a sufficient basis on which to uphold such a standard. Justice Marshall observed that "every Cabinet department and about forty federal agencies" have adopted standards barring discriminatory effects under title VI[72] and noted

65. *Id.*

66. *Id.* The district court held that although plaintiffs had not established that the New York City Police Department acted with discriminatory intent, the tests violated title VI because they had a disparate impact on minorities. Guardians Ass'n v. Civil Serv. Comm'n, 431 F. Supp. 526, 538-39 (S.D.N.Y. 1977). The Second Circuit vacated and remanded the case for reconsideration in light of Teamsters v. United States, 431 U.S. 324 (1977). On remand, the district court determined that, under *Teamsters*, plaintiffs were not entitled to any relief for discrimination that occurred prior to March 24, 1972, the date on which title VII became applicable to municipalities. Guardians Ass'n v. Civil Serv. Comm'n, 466 F. Supp. 1273, 1280 (S.D.N.Y. 1979). With regard to plaintiffs' title VI claim, the district court held that a showing of discriminatory effect is sufficient to establish a title VI violation and that plaintiffs were entitled to compensatory as well as injunctive relief. *Id.* at 1287. On appeal, the Second Circuit affirmed the district court's title VII holding but reversed its title VI holding. The Second Circuit concluded that *Bakke* overruled *Lau* and therefore proof of discriminatory intent is essential to establish a violation of title VI. Guardians Ass'n v. Civil Serv. Comm'n, 633 F.2d 232, 270 (2d Cir. 1980), *cert. granted,* 454 U.S. 1140 (1982).

67. 103 S. Ct. at 3225-26.

68. *See supra* note 56.

69. 103 S. Ct. at 3226.

70. *Id.*

71. *Id.*

72. *Id.* at 3241 (Marshall, J., dissenting). Justice Marshall also noted that

that Congress has never changed the administrative interpretation of title VI despite ample opportunity to do so.[73] Justice Stevens noted that the Supreme Court has repeatedly upheld legislatively mandated administrative regulations that adopt a discriminatory effects standard under title VI.[74] Stevens concluded that the regulations in question were enforceable[75] because they were "reasonably related to the purposes of the enabling legislation."[76] Consequently, the plaintiffs' showing that the defendant was making entry-level appointments to the New York City Police Department in a manner that the had a discriminatory impact on blacks and Hispanics was sufficient to establish a violation of federal law.[77]

IV. *GUARDIANS* AND DISPARATE IMPACT UNDER SECTION 504

The Supreme Court's decision in *Guardians* supports the conclusion of the Sixth Circuit, in *Jennings v. Alexander*,[78] and

since the enactment of the Civil Rights Act of 1964, Congress has enacted ten civil rights statutes patterned after title VI, including the Rehabilitation Act, none of which require proof of discriminatory intent. *Id.* at 3242.

73. *Id.* at 3241.

74. *Id.* at 3254 (Stevens, J., joined by Brennan and Blackmun, J.J., dissenting) (citing Fullilove v. Klutznick, 448 U.S. 448, 479 (1980); Lau v. Nichols, 414 U.S. 563, 568, 571 (1974)).

75. *Id.* at 3255.

76. *Id.* at 3254 (quoting Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 369 (1973)). Justice Stevens reasoned that an administrative regulation should not be disregarded unless "it is plainly and palpably inconsistent with law." *Id.* at 3255 (quoting Boske v. Comingore, 177 U.S. 459, 470 (1900)). Stevens concluded that a regulation calling for a discriminatory effects standard is an appropriate means to implement the mandate of title VI. *Id.* at 3255.

77. *Id.* Chief Justice Burger, and Justices O'Connor, Rehnquist, and Powell, however, concluded that *Bakke* overruled *Lau* and consequently that there must be a showing of discriminatory intent to establish a violation of title VI. *Id.* at 3236-38. Justice O'Connor also argued that because *Bakke* establishes that only purposeful discrimination violates title VI, the administrative regulations in question, which adopt an effects standard, go well beyond the purposes of the statute and are therefore impermissible. *Id.* at 3238 (O'Connor, J., concurring in the judgment).

Justice Powell rejected plaintiffs' claim on the ground that no implied private cause of action exists under title VI. *Id.* at 3236 (Powell, J., joined by Burger, C.J., concurring in the judgment). Powell noted that whether a private right of action should be implied depends on congressional intent. *Id.* He concluded that Congress clearly indicated that it did not intend a private cause of action under title VI by expressly providing for the termination of funding through "a carefully constructed administrative procedure to ensure that such withholding of funds is ordered only where appropriate." *Id. But see supra* note 21.

78. 715 F.2d 1036, 1041-42 (6th Cir. 1983).

the Third Circuit, in *NAACP v. Medical Center, Inc.*,[79] that a showing of disparate impact is sufficient to establish a violation of section 504 of the Rehabilitation Act. As noted above, Congress specifically patterned section 504 after title VI.[80] The legislative history of section 504 suggests that Congress intended section 504 to be the functional equivalent of title VI in the handicap discrimination context.[81] Moreover, Congress intended that administrative agencies implement both title VI and section 504 by the promulgation of regulations.[82] The regulations promulgated under section 504, like those promulgated under title VI, call for the application of a discriminatory effects standard.[83] For these reasons, the Supreme Court's analysis in *Guardians* should be extended to validate the disparate impact standard prescribed by the regulations promulgated under section 504.

Despite the similarities between section 504 and title VI, differences do exist in the language of the two statutes. Section 504 forbids discrimination against any "otherwise qualified handicapped individual . . . solely by reason of his handicap."[84] Title VI, on the other hand, provides only that "[n]o person in the United States shall, on the ground of race, color, or national origin be subjected to discrimination."[85] Thus, section 504 adds the terms "otherwise qualified" and "solely" to the language of title VI.

The two statutes seek to protect different types of classes of individuals. Individuals identified as handicapped may share more relevant characteristics than, for example, individuals belonging to a particular race. In addition, although race, color, sex, and national origin are never permissible factors for distinguishing between individuals in employment or federal programs,[86] an individual's handicap is a permissible factor in determining whether that individual is "otherwise qualified" within the meaning of section 504.[87]

These differences, however, do not justify the rejection of a

79. 657 F.2d 1322, 1331 (3d Cir. 1981).

80. *See* Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1974, Pub. L. No. 95-602, § 120(a), 92 Stat. 2955, 2983 (codified as amended at 29 U.S.C. § 794a (1982)); *supra* notes 33-34.

81. *See supra* notes 33-34 and accompanying text.

82. *See supra* note 42.

83. *See supra* notes 39-43 and accompanying text.

84. 29 U.S.C. § 794 (1982).

85. 42 U.S.C. § 2000d (1976).

86. *See supra* notes 45-46 and accompanying text.

87. *See supra* notes 24-25 and accompanying text.

disparate impact standard under section 504. The difference in statutory language between title VI and section 504 results from Congress's recognition that handicap, unlike race or sex, may constitute a legitimate basis for exclusion.[88] To come within the protections of the Act, a handicapped individual must be "otherwise qualified."[89] The Supreme Court has noted, however, that the "otherwise qualified" and "solely" provisions in section 504 mean "only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context."[90] If a handicapped individual has shown that he or she is "otherwise qualified" under section 504, precluding that individual from relying on the disparate impact standard serves no justifiable purpose. Even if a handicapped plaintiff relying on a disparate impact standard establishes a prima facie case of discrimination under section 504, the defendant still has the opportunity to demonstrate that the plaintiff's handicap was a legitimate basis for exclusion.[91]

Moreover, the greater heterogeneity of the group of individuals who might be characterized as handicapped does not justify disallowing a disparate impact test under section 504. The passage of the Rehabilitation Act provided notice to programs and activities that receive federal financial assistance that discrimination against the handicapped violates federal law. The Act[92] and administrative regulations promulgated thereunder[93] define handicap, and case law under the Act further refines that definition.[94]

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88. *See* Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372 (10th Cir. 1981). The Tenth Circuit described this distinction as follows:

> [T]he issue is not merely whether the handicap played a prominent part in [Dr. Pushkin's] rejection, as in cases dealing with alleged discrimination on the basis of race . . . . The question is whether Dr. Pushkin was qualified for admission to the residency program in spite of his handicap, so that he was wrongfully rejected from the program on the basis of that handicap, or whether Dr. Pushkin's handicap would preclude him from carrying out the responsibilities involved in the residency program and future patient care.

Id. at 1384-85.

89. *See supra* notes 21, 24-25, and accompanying text.

90. Southeastern Community College v. Davis, 442 U.S. 397, 405 (1978).

91. *See supra* note 47.

92. 29 U.S.C. § 706(7) (1982).

93. *See supra* note 22.

94. *See, e.g.,* New York Ass'n for Retarded Children v. Carey, 612 F.2d 644, 649 (2d Cir. 1979) (carrying a potentially contagious disease); E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Hawaii 1980) (congenital back problem), *vacated on other grounds,* 26 Fair Empl. Prac. Cas. (BNA) 1183 (D. Hawaii 1981); Doe v. Colautti, 454 F. Supp. 621, 626 (E.D. Pa. 1978) (present or former mental illness), *aff'd,* 592 F.2d 704 (3d Cir. 1979); Davis v. Bucher, 451 F. Supp. 791, 796 (E.D. Pa. 1978) (former drug addiction); Drennan v. Philadelphia Gen. Hosp.,

Claims based on a disparate impact theory of recovery have also succeeded under section 501 of the Act, which prohibits discrimination by the federal government in the hiring and promotion of handicapped individuals.[95] For example, in *Prewitt v. United States Postal Service*,[96] the Fifth Circuit permitted a disparate impact analysis in an action brought under section 501.[97] The court quoted with approval Equal Employment Opportunity Commission (EEOC) regulations promulgated under section 501 which call for an "effects" test,[98] and explicitly applied the disparate impact analysis adopted by the Supreme Court in *Griggs v. Duke Power*[99] to plaintiff's handicap discrimination claim.[100] The use of disparate impact theory under other sections of the Act demonstrates that the heterogeneity of handicapped individuals does not preclude the use of disparate impact to prove violations of section 504.

The legislative history of section 504 strongly suggests that discrimination based on handicap should be treated similarly to discrimination based on race, color, sex, or national origin under title VI. Congress patterned the language and enforcement of section 504 directly after title VI[101] and in 1978 specifically amended section 504 to incorporate "the remedies, procedures, and rights set forth in title VI."[102] It seems likely that if Congress intended to disallow a disparate impact analysis under section 504, it would have done so explicitly.

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428 F. Supp. 809, 815 (E.D. Pa. 1977) (epilepsy); Gurmankin v. Costanzo, 411 F. Supp. 982, 989 (E.D. Pa. 1976) (blindness), *aff'd*, 556 F.2d 184 (3d Cir. 1977), *appeal dismissed*, 614 F.2d 770 (3d Cir. 1980), *cert. denied*, 450 U.S. 923 (1981).

95. 29 U.S.C. § 791 (1982).

96. 662 F.2d 292 (5th Cir. 1981).

97. *Id.* at 306-07. Plaintiff had limited mobility of his left arm and shoulder as a result of gunshot wounds received while serving in Vietnam. Plaintiff alleged that the Postal Service had discriminated against him in denying his application for a clerk/carrier position, which required heavy lifting. *Id.* at 297. Plaintiff claimed he could perform the required tasks despite his disability. *Id.*

98. *Id.* at 306-07 (quoting 29 C.F.R. § 1613.705 (1981)).

99. 401 U.S. 424 (1971); *see supra* note 8.

100. Similarly, in Bey v. Bolger, 540 F. Supp. 910 (E.D. Pa. 1982), the court held that a showing of disparate impact is sufficient to establish a prima facie violation of § 501. *Id.* at 925. In *Bey*, claimant sought reinstatement to a postal clerk position following the completion of a two-year enlistment with the Navy. The court concluded that claimant's hypertension was a handicap which prevented him from performing his essential employment functions without endangering his health and safety and that consequently the Postal Service's denial of his request for reinstatement did not violate § 501. *Id.* at 927-28.

101. *See supra* notes 33-34 and accompanying text.

102. Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1974, Pub. L. No. 95-602, § 102(a), 92 Stat. 2955, 2983 (codified as amended at 29 U.S.C. § 794a (1982)).

Like the regulations promulgated under title VI, the regulations promulgated under section 504 specifically adopt a disparate impact standard.[103] Significantly, during the hearings on the 1978 amendments to the Rehabilitation Act, the Senate Committee on Human Resources stated: "It is the committee's understanding that the regulations promulgated by the Department of Health, Education, and Welfare with respect to procedures, remedies, and rights under Section 504 conform with those promulgated under title VI. Thus, this amendment codifies existing practice as a specific statutory requirement."[104]

In *Guardians Association v. Civil Service Commission*,[105] a majority of the Supreme Court gave deference to the regulations adopted under title VI and reaffirmed that disparate impact is sufficient to establish a violation of title VI.[106] The degree of deference the Court gave the administrative regulations is evidenced by the willingness of five Justices to uphold a disparate impact standard under title VI solely on the basis of those regulations. Justices White, Marshall, Stevens, Brennan, and Blackmun all agreed that the administrative regulations promulgated under title VI provide an ample basis for holding discriminatory effects illegal under title VI.[107]

Because the only substantively significant difference between title VI and section 504 is the nature of the protected class,[108] the holding and reasoning of *Guardians* should be extended to actions arising under section 504. In light of the Court's analysis in *Guardians*, proof of disparate impact should be held sufficient to establish a prima facie case of discrimination under section 504.

CONCLUSION

Section 504 must not be interpreted narrowly. The Supreme Court has often stated that courts must accord civil rights legislation "a sweep as broad as [its] language."[109] Like title VI, the language of section 504 "is majestic in its sweep."[110]

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103. *See supra* notes 39-43 and accompanying text.
104. S. REP. No. 890, 95th Cong., 2d Sess. 19 (1978).
105. 103 S. Ct. 3221 (1983).
106. *See supra* note 67 and accompanying text.
107. *See supra* notes 72-77 and accompanying text.
108. *See supra* notes 86-87 and accompanying text.
109. North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) (quoting United States v. Price, 383 U.S. 787, 801 (1966)); *see also* Griffin v. Breckenridge, 403 U.S. 88, 97 (1971); Daniel v. Paul, 395 U.S. 298, 307-08 (1969).
110. Board of Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 284 (1978); *see also* S-1 v. Turlington, 635 F.2d 342, 347 (5th Cir. 1981) ("section 504, as [a]

In *Guardians Association v. Civil Service Commission*, the Supreme Court indicated that the Third Circuit, in *NAACP v. Medical Center, Inc.*, and the Sixth Circuit, in *Jennings v. Alexander*, correctly determined that section 504 does indeed permit a disparate impact analysis. The restrictive approach to section 504 taken by the Second Circuit, in *Joyner v. Dumpson*, and the Tenth Circuit, in *Pushkin v. Regents of the University of Colorado*, conflicts with the broad remedial purposes of the Rehabilitation Act, the mandate of Congress, and the Supreme Court's recent holding in *Guardians*, which indicate that great deference should be accorded administrative regulations.

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remedial statute, should be broadly applied and liberally construed"), *cert. denied,* 454 U.S. 1030 (1981).